A GUIDE TO CONDUCTING A HEARING IN A HIGHER EDUCATION SETTING

By Robert E. Bienstock

The Higher Education Administration Series

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A GUIDE TO CONDUCTING A HEARING IN A HIGHER EDUCATION SETTING

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The Higher Education Administration Series
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Introduction

PURPOSE AND OVERVIEW

Purpose

This guide aims to teach members of college and university panels and committees how to run an adversarial administrative hearing. In particular, it shows you how to conduct semi-formal hearings using the Model Hearing Procedure (Appendix). You may use the Procedure for hearings under your institution's student, employee or faculty, or other grievance policies. While the material will be of value for individuals and panels conducting less formal hearings, it will focus on hearings with witnesses, documentary evidence, prior notice, cross-examination, etc., conducted when the parties have significant due process rights.

The guide focuses on the practical nuts and bolts issues of putting together a hearing, such as time management, communications with the parties and witnesses, maintaining control of the process, and drafting decisions. It addresses legal issues only in passing; it assumes that you have access to an attorney to advise you when legal issues arise.

The goal of the guide is to enable you to maintain control of your hearings, keep the parties and their lawyers and advisors from taking over, and stay on schedule. It will also help you make decisions and write decisions in a way that increases the likelihood that they will be upheld on appeal, or in court.

Finally, during the course of an administrative hearing it is safe to expect the unexpected. Our hope is that you glean the basic principles necessary to enable you to be prepared for the unexpected.

Overview

This guide is organized into six sections. Section I, *Framework,* covers the relationships between the parties, the panel, the advisors and attorneys, and your institution's appellate boards; basic due process principles; court attitudes toward university procedures; and the role of the Model Hearing Procedure.

Section II, *Hearing Preparation,* covers the period beginning when the administrator first knows that a hearing must be scheduled and continuing to the day of the hearing itself. Since the key to a successful hearing is proper preparation, this is probably the most important section in the guide.

Section III, *Conduct of the Hearing,* covers the details of the hearing itself, focusing on how to ensure a smooth process, and providing tips on how to get the information you need to make a good decision.

Sections IV and V cover *Deliberations* and *The Written Decision,* respectively. Section IV provides advice on how to go about discussing the hearing as a group so as to reach the best possible decision. Section V advises on how to write your decision to maximize the chances that it will not be reversed on appeal.

The Model Hearing Procedure set out in the Appendix is available for your use. You should consult with your institution's attorney before formally adopting it for hearings.

Chapter I

Framework

ROLES

A typical hearing involves a hearing panel, an administrator assisting the panel with various administrative duties, a complainant (the person who brought the complaint that triggered the formal process), and a respondent (the employee whose decisions or conduct the complainant is challenging). The basic relationship between the panel, the complainant, and the respondent is shown in *Figure 1.* While there is some exchange of information between the complainant and the respondent, each of them is primarily interacting with the panel. Typically, the complainant is a person with less institutional power than the respondent, sometimes significantly less.

For example, typical complainant-respondent pairs are a faculty member denied tenure and the provost; a student accused of theft and the dean of students; an administrative assistant who was terminated and the director or vice president who approved the termination. The respondent typically enjoys the support of his or her supervisor and may gain additional support from the institution's attorney. Often, the action that was challenged was made in consultation with, and with the support of, numerous institutional officials.

In this scenario, where does the interest of the institution itself lie? Who has the support of the institution? Or, to put it another way, which party is your governing board[1] most aligned with?

The answer is that the governing board is most aligned with the panel. The panel is endowed with the authority of the governing board by the grievance procedure it is using.[2]

1. For convenience, this manual uses "governing board" to refer to your institution's board of trustees, regents, or other ultimate authority. It assumes that it is the governing board that adopted or authorized the procedures you are operating under.
2. For example, an academic freedom and tenure policy, a student grievance procedure, or an employee dispute resolution policy.

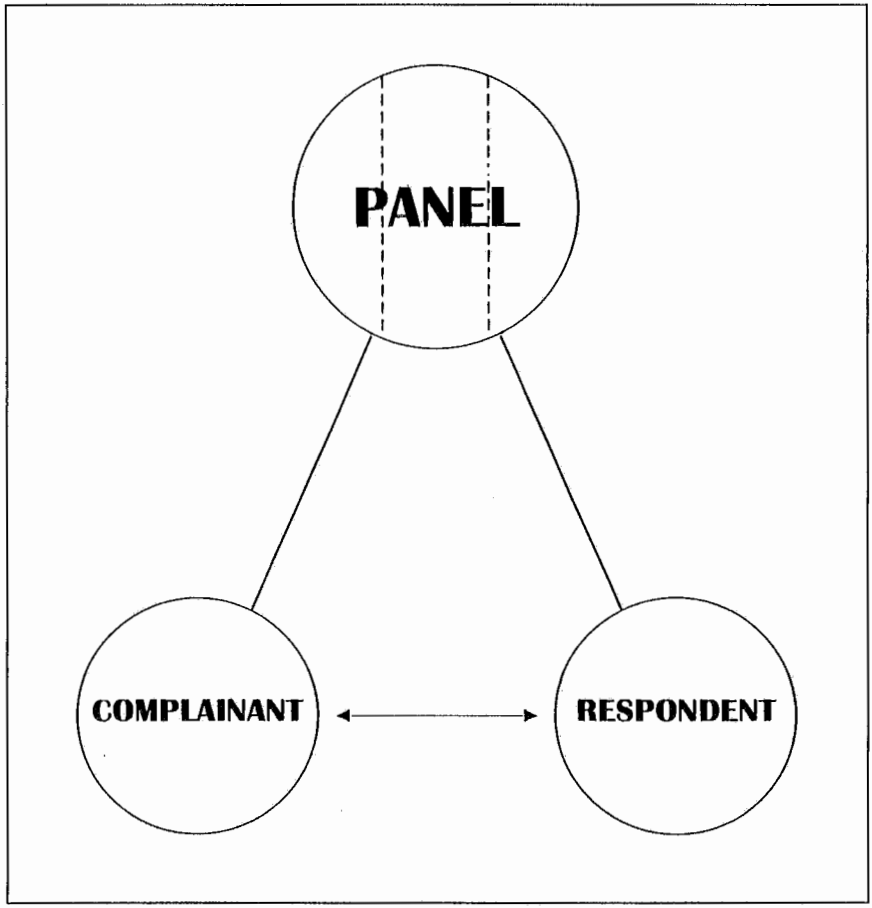

Figure 1

As between the other two parties (the complainant and the respondent) they are exactly equal for the purposes of the grievance process. Even if the respondent is your president, the panel is higher in the hierarchy for the purposes of this process. If you are a panel member, and typically have less authority within your institution than, say a vice president, this may take some getting used to. Get used to it. You may give no more weight to what the respondent says than to what the complainant says (unless you are more persuaded by what the respondent says).

Look again at *Figure 1.* You will notice that the circle representing the panel is divided into three. Often, there are three panel members who are chosen in different ways. In some procedures, one panel member is chosen from the same general institutional category as each party. For example, if the complainant is a student and the respondent is

a professor, then at least one panel member must be a student, and at least one panel member must be a professor. Under other procedures, each party gets to name one member to the panel.

Thus, some panel members come with special relationships to one of the two parties. How should this relationship affect the panel member's conduct and attitude on the panel? The answer, surprisingly, is: not at all! Once you are appointed to a panel, you are to maintain strict neutrality between the parties. This is true even if you are more familiar with one of the parties than the other. If you come from the same institutional category as one of the parties, you may use your general perspective and knowledge to help you understand the case, and you should share that perspective and knowledge with the other panel members. But you should not in any way lean toward the person in the same category as you, or automatically argue on behalf of that person in deliberations. In fact, your greater understanding of that person's situation might even lead you to side against that person. In any event, regardless of how you were chosen, you now represent the governing board, and must take a neutral stance between the two parties.

Please consider *Figure 2.* As you can see, the governing board, appellate body, and lawyers (*L*) have been added to the diagram to reflect their linkage to the panel. Consider now the role of lawyers. Often the complainant will have an attorney. Sometimes the attorney helps behind the scenes, sometimes in the form of letter writing and sometimes actually appearing at the hearing. The respondent may also have a lawyer. Sometimes, that lawyer is the institution's lawyer. That lawyer, too, may either be behind the scenes, writing letters on behalf of the respondent, or may appear at the hearing.

What then, should be made of the fact that the lawyer advising the respondent is the institution's lawyer while the lawyer for the complainant is an outsider?

By now, you can guess the answer—nothing. The lawyer representing the respondent was assigned to that position for one or more of a variety of reasons, ranging from the practical to the political. The respondent's contract with the institution may provide the right to a lawyer's assistance. The respondent may simply have enough clout within the institution to insist upon legal support. There may be a policy or law in place which guarantees free legal representation under the particular circumstances.

In any event, the lawyer is not representing the institution or its legal office (if it has one). The assigned lawyer is acting as a hired gun, just like the complainant's lawyer. Should the panel need legal advice, it will rely on a different lawyer, who may also come from the institution's legal office.

You might be wondering how two lawyers in the same office can represent different factions in a hearing. Certainly, in a private law

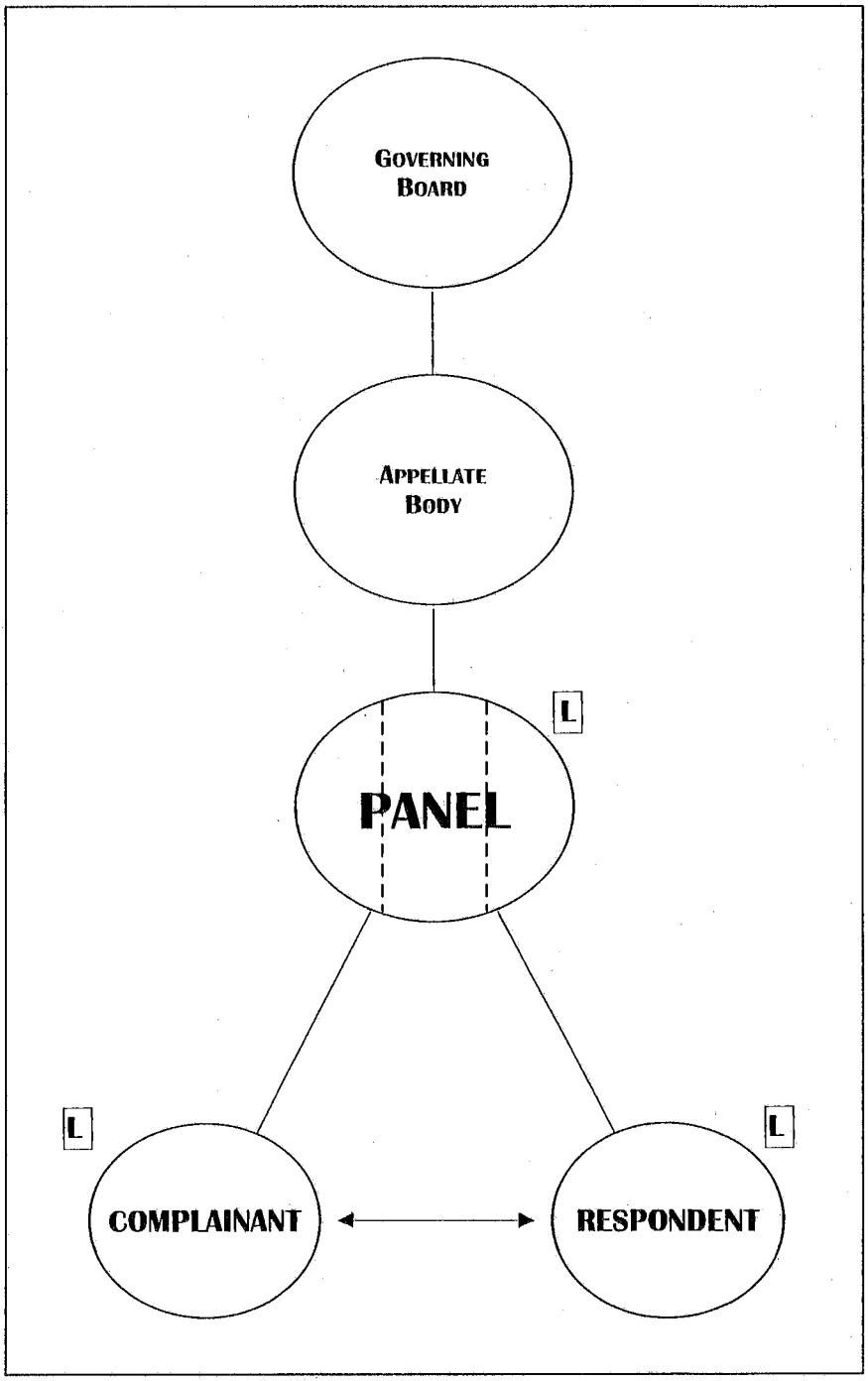
GOVERNING BOARD
APPELLATE BODY
L
PANEL
L
COMPLAINANT
RESPONDENT
L

Figure 2

firm, this would not be allowed.[3] In a government setting, however, this is permissible, provided the lawyers act as if they were in separate offices when they are working on the case. They must maintain separate files, and agree not to talk about the case with each other.

In short, even if the lawyer representing the respondent is someone you deal with on a regular basis, and whose advice you normally trust, do not apply that same trust in a grievance hearing. That lawyer is now representing someone else and not you. What the lawyer is saying and arguing for will be in the respondent's best interest, and not necessarily yours.[4] If you need legal advice as a panel member, turn to an attorney specifically assigned to the panel.

Next, we turn to the role of the panel after the case has been decided, if it is challenged on appeal. In most institutional grievance procedures, either side may appeal the decision of the panel to a higher authority. See *Figure* 2. The appellate body has greater authority than the panel in that it can reverse or nullify the panel's decision. Like the panel, it derives its authority directly from the governing board, through an official policy or procedure.

What is the role of the panel in the appeal stage?

If you guessed "none," you are almost correct. After the panel makes its decision and puts it in writing, it disbands. What it leaves behind is its written decision and its file. The appellate body will take into consideration whatever the panel produces as its final product, along with the arguments, written or verbal, of the complainant and respondent, and the tape of the hearing.[5] The written decision is the panel's legacy, and anything that it might want an appellate panel to know should be included in it. See *Figure 3.* We will discuss in some detail, in Section 5, how to draft the decision so that this goal is accomplished.

DUE PROCESS PRINCIPLES

The United States Constitution says that the government cannot take away anyone's life, liberty, or property without due process of law. When people complain that grievance procedures violated their rights or that institutional policies have been violated, courts will typically view these rights as a form of "property" and therefore require us to make sure that we have provided "due process."[6] It is the panel's

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3. It would be prohibited by lawyers' rules of ethics.

4. The same is true, of course, of the complainant's lawyer.

5. The appellate body will also have access to the evidence presented at the hearing,

6. The respondent also may have due process rights. A decision for the complainant would be a black mark on the respondent's employment record, and might even result in discipline against the respondent. This harm is probably enough to create due process rights.

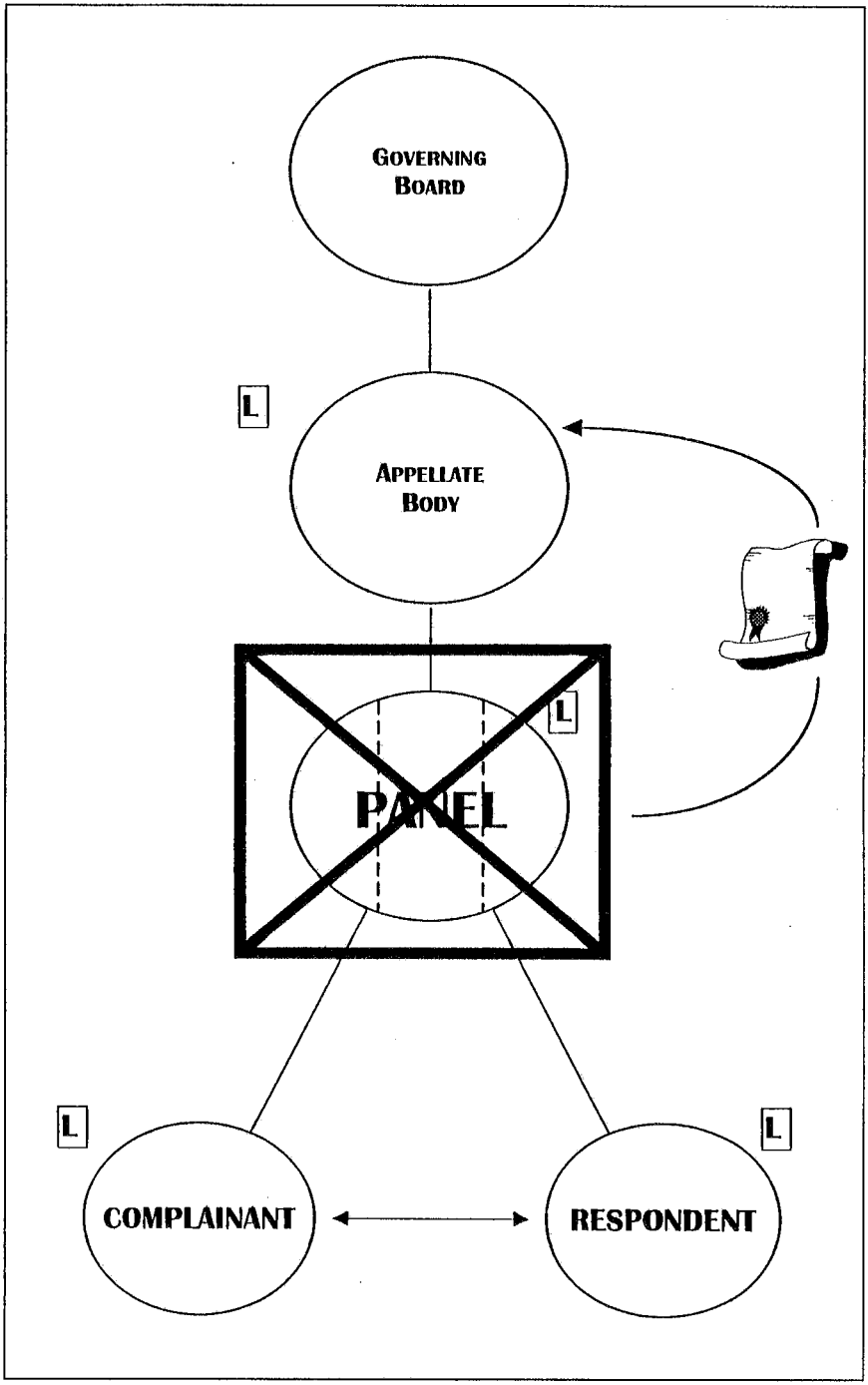
GOVERNING BOARD
L
APPELLATE BODY
L
PANEL
L
L
COMPLAINANT
RESPONDENT

Figure 3

obligation to make sure that this happens. What, then, does due process require?

Fortunately, due process is easy to provide. It is not necessary to use complicated rules about evidence, cross-examination, legal representation, or other typical features of courtroom trials. It is enough to know two basic principles—the person must be provided *notice* and an *opportunity to be heard.*

Notice means that the person must be told what is going on. The person must know what he or she has been accused of (if anything), and what the basic evidence is. Each side has the right to know whatever the panel and the other side know, within reason. This means, for example, that the panel cannot question witnesses behind closed doors—the parties must be present. Similarly, the panel cannot send letters to one side without copying the other side. More on this later.

The *opportunity to be heard* is fairly easy to provide. Obviously, the hearing gives each side its opportunity to be heard. This means you must give each side an opportunity to show you what it wants to show you, and tell you what it wants to tell you. It also means that you must truly listen to the evidence and the arguments.

While there are numerous technicalities about due process, such as cross-examination, right to an attorney, etc., you do not need to worry about these if you follow the Model Hearing Procedure. The procedure has been designed to give both sides much more due process than they are entitled to. In other words, you have room for mistakes. As long as you follow the basic procedure, you will not violate anyone's due process rights.[7]

CONFLICT OF INTEREST

What do you do if you know one of the parties to the case? What if your best friend is a key witness? What if one of the parties is a departmental colleague? What do you do if you were there when the key events happened? What do you do if the decision in the case might impact you personally? Under what circumstances do you have to leave the panel? (This is called being excused or recused from the panel.) And who makes the decision?

The key principle is that you must be able to make a fair objective decision based solely upon the facts, evidence, and arguments made to you, with no influence based upon your familiarity with the peo-

7. There are two exceptions to this. If the case you are deciding involves taking away a professor's tenure, or if it is about something that one of the parties is facing criminal charges on, that professor or party may have a right to more use of an attorney than is provided in the Model Hearing Procedure. If you are facing either one of these situations, you should get legal advice on this point.

ple, facts, or situation. This guides your response to each of the above situations.

This section will first discuss what happens if you know some of the parties or witnesses to the case. Then it will address what happens if the decision could affect you personally. Finally, it will cover the situation in which you know something about the case itself.

Contrary to common belief, you can still serve on the panel even if you know one or more parties or witnesses. This is true even if you have a close relationship with them. Courts understand that at college and university hearings, everybody involved comes from the same community, and the odds are that some panel members will know some of the parties or witnesses—indeed, it is probably unavoidable.

If the relationship is such that it will not affect your decision-making or produce any bias, there is no reason for you to be recused. In one sexual harassment case, for example, one of the panelists was a former tennis partner of the respondent. There had been two or three games several years earlier. The panelist did not believe this would in any way affect his ability to decide the case, or create any predisposition in him. He disclosed it to the other panel members and to both parties, and no one had any objection.

On the other hand, if you are best friends or immediate family members with a party or key witness, the relationship would probably be too strong to allow you to continue—you would likely be influenced by the relationship (including, possibly, bending over backwards to be fair to the other side).

Under any circumstances, it is essential that you disclose to the other panelists and both parties your relationships with all parties and witnesses. If you do not do this, then the losing party can appeal later based upon your possible conflict of interest. This does not mean that the party will win, but it does create a basis for challenge. If you disclose up front, more likely than not both parties will agree to allow you to continue on the panel. They will have thereby waived their objections.

The second category of reasons for recusing yourself would be if you had a conflict of interest—that is, if you stand to gain or lose personally depending upon the outcome of the hearing. For example, if an employee is claiming failure to promote, and your spouse works in that same department, then the decision of the panel could ultimately have an effect on your spouse's future career path. You would have to recuse yourself.

The third category is when you have some prior familiarity with the facts of the case. Again, especially in a college or university community, some cases reach a level of publicity in which panelists may well have had some secondhand familiarity with the case. While this

might create a problem in a criminal trial, it is not enough to cause recusal in a college or university hearing. If, however, you have personal familiarity with key facts of the case, then you will not be able to defer to the evidence presented before you. Your own personal observations and memory may agree or disagree with that of some of the witnesses. You would need to recuse yourself.

Objections to your continuing on the panel may be made by either party or by a panel member. The method for resolving the objection is probably set forth in the procedures setting up the panel. If it is not, you can resolve the objection by decision of the chair, by consulting a higher authority, or by vote of the remaining members. The first method fails if it is the chair who is challenged. The second method causes delay, and it is not always clear which higher authority is appropriate. I prefer the third method—it is fast and straightforward.

The most important thing to remember is to disclose any previous relationship or possible bias, even if you do not think that you should be recused. This gives both parties a chance to either object to your presence on the panel or waive their objections. Again, generally, most of the time the parties will waive their objections, and you will be allowed to remain on the panel.

If all of this seems worrisome, relax. The courts understand that college and university hearing panel members are not trained judges or lawyers. They understand that it is a good thing that panelists are not lawyers! The courts respect the fact that institutions of higher education need to resolve their disputes internally, with some informality. The courts do not want colleges to have to create mini-courtrooms in order to settle their internal differences. As long as you are reasonable and basically fair to both sides, and as long as you (more or less) follow the Model Hearing Procedure, or something like it, you will be all right.

Chapter II

Hearing Preparation

INITIATING THE PANEL

With that word of encouragement, let us proceed to discuss the first steps in preparing for a hearing. Suppose that you are the administrator of a grievance procedure, and that the panel members have just been named. It is your job to contact them. What will you tell them?

You might want to tell them the basics of their task. You might want to convey some of the perspectives covered earlier in this guide—about them being independent decisionmakers, siding with neither one side nor the other. Consider sending a memorandum fashioned along the lines of *Example 1*, on the next page. (The examples in this guide are for your use; feel free to modify them.)

SETTING TIME LINES

Time management, planned in advance of the hearing, is essential to running a smooth hearing.

Days

It is critical that you make a reasonably accurate and somewhat generous estimate of how many days will be required for the hearing. Because so many people's schedules must be accommodated (the parties, the panel members, and often, attorneys), hearings must be set a month or more in advance. If the time needed for the hearing is underestimated, you will find yourself at the end of the hearing with the need to schedule another session. This second session will then take place a month or two after the first session, disrupting the process quite badly.

I was involved in a hearing in which we were given one day—a grossly inadequate amount of time considering the issues at stake. There were a few delays, and we did not get very far. The panel then de-

TO: Grievance Panel Members
FROM: *[Administrator or Chair]*
RE: Your Role in the Hearing

Thank you for agreeing to serve on the hearing panel deciding the *[identify the grievance]* grievance.

Your role is to decide whether or not *[your institution]* policies were violated when *[summary]*. You are to base this decision solely on the evidence presented to you at the hearing.

Regardless of how you were chosen or who selected you, you need to ignore anything you may have previously heard about this matter and to leave behind any biases or preconceptions. You must listen to the evidence and make decisions based solely on that evidence.

Each one of you is an independent decisionmaker, entitled to an equal vote. While you should attempt to reach a consensus, a majority vote is sufficient. Your deliberations will be confidential. You should reach your decision with neutrality and fairness.

[Grievant] will claim that there has been a violation of *[your institution]* policy or procedures. It will be *[his]/[her]* job to state what actions *[he]/[she]* is complaining of, what policies or procedures *[he]/[she]* thinks were violated, why *[he]/[she]* thinks a violation occurred, and what remedy *[he]/[she]* wants in return. It will be the job of *[respondent]* to convince you either that the alleged actions did not occur the way *[grievant]* says they did, or that they did not violate *[your institution]* policies or procedures in a way that *[grievant]* should get the remedy *[he]/[she]* claims. It will be your job to sort out these conflicting claims and decide who is right.

If *[grievant]* is unhappy with your decision, *[he]/[she]* may request a hearing with the *[appeals body]*.

Example 1

cided to set two additional days to complete the hearing. Two consecutive days could not be scheduled for another five months. Those two days turned out to be insufficient—a little more time was needed. One last day was added to the schedule, but a mutually agreeable time could not be found for another seven months. The evidence was thus presented to the panel over a 12-month period. As you can imagine, it was exceedingly difficult for the panel to weigh all the evidence evenly. While this was an extreme case, it is not unusual for three-day hearings to be spread over six months due to underestimating the necessary time.

How can this be avoided? First, ask each side how much time it will need. Then, hold them to it. So long as there is plenty of notice, there is nothing wrong with limiting the amount of time a party has.

You will need to be careful not to count a party's cross-examination or questioning from the panel against the other side's time allotment.

You can budget time for cross-examination. One approach is simply to set a certain amount of time for both sides (mutually agreed upon, preferably), and then allow each side to allocate that time between putting on its evidence and cross-examining the other side's witnesses, with panel questioning not counting. This may require some careful attention to clock watching during the hearing itself, but it guarantees that the hearing will not run over schedule. If you are careful to give yourselves some leeway, you can even be a bit flexible in allowing the parties to run slightly over their time limits without having to reschedule the hearing.

Whether or not you decide to follow strict time limits, it is important to make realistic estimates of how much testimony you can hear in one day. Typically, six hours is the maximum. Hearings usually do not start until 8:30 a.m. and end shortly before 5:00 p.m. Time must be allocated for lunch and bathroom breaks. Typically, there are also short breaks for the panel to confer, or for parties to confer with their attorneys. There is often a short break between each witness. Oftentimes a party raises a procedural question that the panel needs time to resolve. Because both sides, their attorneys, the panel members, and the panel's attorney all must be present, every person who is late getting back from break slows the entire process.

Of the six hours of testimony, typically one-third will be cross-examination and panel questioning. Thus, for a typical day in a typical hearing, you could hear only four hours of direct testimony. So, when you ask each side how long they expect to take presenting their case, not including questions from others, plan on one full day of hearing for each four hours of planned testimony. Ask the parties to include their opening and closing statements in their time estimates.

If the hearing needs to run for more than two days, it will be difficult to find blocks of consecutive days for which people can be available at the hearing. It may be easier to schedule the hearing for a particular day of the week, set for consecutive weekly sessions, beginning a month or two down the road.

Hours

You can squeeze more into your day if you plan human needs carefully. Having coffee and water available at the hearing enables you to have shorter breaks (so that people don't have to run out to a coffee shop). If the hearing is held when classes are in session, so that campus cafeterias are open, you can set a tighter lunch hour. Planning parking for off-campus attendees will enable them to get to the hearing on time, and avoid the need for parking meter breaks.

Also consider whether you are willing to continue the hearing into the evening. If you are considering this as a last resort, make sure to let everyone know. There is nothing so frustrating as to have only one or two hours left to a hearing, and everyone willing to go into the evening except one person who has unchangeable obligations for, say, child care or picking up a friend at the airport.

Finally, don't forget to plan time for panel deliberations. You will want to discuss the evidence and testimony as soon as possible after the close of the hearing (unless you have provided a delay for written arguments). At one grievance in which I participated, all the planning went beautifully until the end of the hearing, when we learned that one panel member was leaving that evening for a three-week trip. In another, intervening obligations created a six-month gap between the hearing and the deliberations. Needless to say, this delayed the final decision considerably.

FRAMING THE ISSUES

In complicated cases, you can often reduce the length of the hearing by pushing the parties to carefully define their issues prior to the hearing. The grievant should be required to specify what conduct he or she is grieving and what institutional policies or rules are at issue. The respondent can be required to answer these claims, stating whether there is a disagreement over the facts, over their interpretation, or both. Sometimes, a written statement by the panel (after consulting with the panel's attorney) summarizing what each side hopes to prove can be sent to both parties to see if they agree. An informal meeting might accomplish the same thing. The two sides can be asked whether there are facts as to which they agree, avoiding the need for proving them at the hearing.

All of these methods have been successfully used to narrow the scope of the hearing and thereby save time.

SETTING BASIC RULES

Role of Attorneys

Generally, the parties can bring an advisor or an attorney to the hearing, but this person may not speak on the party's behalf. The attorney/advisor is there simply to enable the party to have someone to consult. See Section 3.3 of the Model Hearing Procedure. Plan, ahead of time, how strictly you intend to interpret this rule. Will you allow the attorney[1] to: ask questions; to raise procedural objections either during the hearing or at convenient break points; to make opening or closing statements? Deciding these questions ahead of time will

1. I use the term "attorney" to refer both to attorneys and to non-attorney advisors.

eliminate the need for panel consultation on these points during the hearing itself.

In those rare circumstances in which a party is unable to represent her- or himself adequately, you may allow an advisor to speak for the party. This should be used only in rare situations, such as where one party has a great advantage in presentation skills over the other, or where one party has a disability or language barrier. You should take care to ensure that the advisor's participation doesn't create a disadvantage for the other party. You need not allow the advisor to speak for the party in all circumstances throughout the hearing. The advisor may be limited to making an opening and closing statement, for example. Under no circumstances should this exception be used to allow the party to avoid presenting his own testimony.

The party seeking to use this exception must make a request of the panel in advance of the hearing. See Model Hearing Procedure Section 2.2.4.

Questioning of Witnesses

The Model Hearing Procedure, Section 3.5, allows the panel to set limits on the questioning of parties and witnesses. In particular, in lieu of unfettered cross-examination, you may require that the parties write down their questions and give them to the panel to ask. Typically, this would be done only when there is a potential for hostility between a questioner and a witness, or where you have a particularly shy or reluctant witness. Again, this is better addressed ahead of time. Even if you do not make a final decision before the hearing, you might agree on general criteria for moving from free questioning to written questions (e.g., if the cross-examination starts turning into an argument).

Order of Presentation

The Model Hearing Procedure provides that the complainant normally goes first. This is because it is the complainant who wants something done—it is up to the complainant to explain why there is a problem and what should be done about it. The panel has the right, however, to require arguments or evidence to be presented in any order it wants. See Model Hearing Procedure Sections 2.3 and 3.4.

Although the procedure allows you to do this as late as three days before the hearing, such short notice is certainly not recommended. The earlier you can provide this information to the parties, the better their presentations will be, and, consequently, the better the information you will have from which to make a decision.

COMMUNICATING WITH THE PARTIES

As you will recall, due process requires that each side has "notice" of the information the panel is taking into consideration. But a

panelist might get information not only from the hearing, but also from informal conversations with a party before the hearing. The other party would have no notice of what was said to the panel. This means that there should be no communications about the dispute between one of the parties to the dispute and the panel or a panel member. All communications should either be by meetings with all parties present, or by correspondence in which all parties are copied. Communications from one party to the panel should be copied to the other party.

Sometimes, however, a party needs administrative information that can best be communicated by a phone call; it would be cumbersome to require the other side to be present. (Examples include details on parking arrangements, calendaring the hearing date, and questions about non-documentary evidence.) How can this be achieved? This is the role of the panel's administrator. The administrator can handle these various communications without consulting both sides. Since the administrator will not be involved in the decisionmaking, this one-sided communication does not corrupt the decisionmaking process. If the panel does not have an official administrator assigned, perhaps the panel members can designate an administrative person in one of their offices to serve this role. If that, too, is impossible, consult your attorney for legal advice on handling logistics.

NOTICES BY THE PARTIES

It is a basic principle that hearings should not be conducted as "trial by ambush." The panel will be able to make a better decision if it gets full information. The parties will be able to present better information to the panel if they know more about each other's case. The Model Hearing Procedure accomplishes this in two ways. First, it provides both sides with access to necessary information within the institution. This is discussed in the next section.

Second, it requires both sides to exchange information about their cases one week before the hearing. (See Section 2.2).

The key information that must be exchanged one week before the hearing is the following:

- a list of all witnesses
- copies of all evidence.

The panel also gets this information, to help it prepare for the case. The Model Hearing Procedure mandates strict enforcement of these provisions (but with an escape hatch): if a party does not include someone on his witness list, he cannot use that person as a witness. If a piece of documentary evidence is not shared one week ahead of time, it cannot be used as evidence.

You must be sure to enforce these rules, even if they seem harsh. Although it may seem that not allowing parties to present evidence

is denying them their due process right to have an "opportunity to be heard," this is not the case. As the panel, you are allowed to set procedural rules and require them to be followed. Fundamental fairness requires that you apply the rules evenly to both sides. You did not deny the party the opportunity; the party failed to take advantage of the opportunity.

Now, for the escape hatch I mentioned earlier. Consider the following hypothetical: a female engineering professor was denied tenure and she claimed sex discrimination. Imagine that on the day of the hearing the complainant announces that that morning she found slipped under her door a handwritten note in the respondent's handwriting addressed to a colleague stating that he knew that "a woman could not make the grade as an engineering professor." On the one hand, the rules prohibit introduction of evidence without the one-week prior notice. On the other hand, this is critical evidence to the case, and your decision would be under-informed without it.

Moreover, the complainant could not possibly have submitted the evidence a week ahead of time, because she did not have it then.[2] Again, on the first hand, however, this surprise evidence is unfair to the other side. The other side needs time to look at the letter, determine whether it is genuine, and, if so, whether there is some explanation. The best solution would be to allow the letter into evidence, but to give the other side a week to respond to it.

This is exactly what the Model Hearing Procedure contemplates in Section 2.2.6. It sets out four criteria for determining whether you should allow evidence in after the deadline. The four criteria are as follows:

- How important is the evidence?
- Could the party have gotten it to you on time?
- How much time is left until the hearing?
- How much unfair surprise would there be to the other side?

As noted in the hypothetical, if the first two criteria strongly lead you to allow the evidence in, but the last two point against it, a reasonable compromise would be to allow the other side some extra time to respond (even if this means reconvening the hearing for a brief time in a week or two).

In addition to prior notification about witnesses and evidence, the Model Hearing Procedure requires the parties to provide other secondary information to the panel a week before the hearing.

First, it requires the parties to state whether they want the hearing open to the public. (Unless both agree, the hearing will be closed.)[3]

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2. Assuming you believe her story.

3. Check with your attorney as to whether your state's laws permit closed hearings.

Second, it requires the parties to state whether they will be bringing an advisor to the hearing, and, if so, whether the advisor is an attorney. The procedure (Section 2.2.3) then gets a little complicated as to what sort of advisor the parties can bring. The rules are summarized in Figure 4. The basic idea is that neither party should be able to surprise the other by bringing in unexpected support. A party may "match" the other party's support, but may not "trump" it. If either side says it is bringing an advisor, then both sides may bring one. Similarly, if either side says it is bringing an attorney, then both sides may bring one. This means that a party who announces that he or she is bringing an attorney, knows that the other side will also be able to bring an attorney, unannounced. The other side can "even the stakes."[4]

The parties' choices on witnesses and evidence are not unlimited. Consider a hearing on a relatively simple dispute in which a party lists 30 witnesses. If you have set strict time limits for each side, this is no problem for you (it may be a problem for the party). If you haven't, and if you have only planned one day for the hearing, you may be heading for trouble. The Model Hearing Procedure (Section 2.2.1) allows the panel to limit the number of witnesses. You can do this as late as three days prior to the hearing.

Use this power with caution, however. You do not want to be accused of violating due process by squelching key evidence. You can tell the party that the case seems to be a relatively straightforward one, and the number of witnesses seems out of proportion to the subject matter. You can then inquire as to what the witnesses will be used for. You can remind the party (even at the hearing itself) that repetitive testimony or character evidence is more likely to irritate the panel than to persuade it.

Equivalent Advisorial Representation at Hearings		**If first party declares it will be advised by**			
		No One:	*Advisor:*	*Attorney:*	
—and second party declares it will be advised by ⇒	*No One:*	No One	Advisor	Advisor or Attorney	**then either side may bring to the hearing ⇐**
	Advisor:	Advisor	Advisor	Advisor or Attorney	
	Attorney:	Advisor or Attorney	Advisor or Attorney	Advisor or Attorney	

Figure 4

4. Also, if the other side consents, the panel or the administrator can authorize an advisor or attorney, even if none of the other exceptions apply.

GATHERING THE EVIDENCE

Each side is responsible for gathering the evidence it wants you to consider. Evidence includes documents, objects, witness testimony, and the parties' own explanations.

Each party bears full responsibility for deciding what evidence it wants to present, and for making sure that you get the evidence at the appropriate time and place.

The respondent often has much better access to the evidence than the complainant. The respondent is often at a higher level in the institution and has more access to files and documentation. The respondent can more easily contact employees and get them to appear at the hearing. Sometimes, the complainant no longer works at the institution, making gathering evidence very difficult.

The Model Hearing Procedure deals with this in Section 2.1.2. First, it provides that:

> All members of the institutional community shall cooperate with the parties' reasonable requests to produce evidence and to appear at the hearing as witnesses.

It goes on to provide that:

> If a party is having difficulty getting cooperation from a potential witness or source of evidence, he or she shall file a request for assistance with the administrator who shall forward it to the panel. If the panel determines that the request is reasonable, it shall assist the party in gaining the necessary cooperation within the community.

This can be a critical aspect of your job. Unless both sides have fair access to evidence, the hearing itself will be fundamentally uneven and unfair, and you will not be fully exposed to both sides of the story in making your decision. While you cannot become personally involved in the case by contacting potential witnesses or gathering evidence on the complainant's behalf, you can send a message to the responsible vice president or the president explaining that all institution employees and students are expected to cooperate, that there has been a problem, and requesting that the president or vice president use his or her authority to ensure that cooperation. If necessary, consult your attorney for assistance in this regard.

If a party is having difficulty in obtaining evidence from outside the institution (for example, from a witness who no longer works there), you have less leverage. Your "subpoena" power does not extend beyond the institution itself. Nevertheless, you still have an obligation to do all that you can to make sure that both parties can bring their evidence before you. Sometimes, a letter from a vice president or the president might convince the outsider to cooperate. Once again, be creative, and remember that your authority comes from the governing board.

While it is the parties' responsibility to bring before you the evidence they want you to know, you are not powerless to gather evidence yourself. See Section 3.1 of the Model Hearing Procedure. If you believe that you cannot resolve the dispute without certain evidence, you may request it. You can either ask a party to produce it, or you can procure it yourselves through your administrator. Typically, this will arise during or after the hearing when you realize that some critical information or testimony is missing. Occasionally, it will arise as soon as the parties have presented their witness lists, when you realize that a critical witness is not on either party's list. You may then, yourselves, request that witness to appear at the hearing.[5] You will then likely conduct the questioning yourselves.

PREPARING WITNESSES AND PARTIES

Parties

Even though you will send your hearing procedure to both sides well in advance of the hearing, the sad truth is that they are unlikely to read and follow it in its entirety. This is the case even when a party has retained an attorney. In fact, the problem is often worse when a party retains an attorney. The party leaves the procedural details to the attorney and the attorney often assumes that standard trial rules apply, without reading the procedure.

Many is the time that a hearing has begun with the complainant fatally unaware of key rules, such as the fact that the attorney will not be able to present the case for the complainant, or that the complainant was responsible for making sure witnesses show up. Flaws such as these would make the hearing so one-sided that the panel is forced to postpone it.

While there is no guaranteed way to get the parties to understand the rules, here are two suggestions. First, you can call a pre-hearing conference (Section 2.4 of the Model Hearing Procedure), and go over the basics there. Second, you can send a separate letter to both sides, a few weeks before the hearing, laying out the rules in plainer English than is found in the Model Hearing Procedure. The basic items you should cover are as follows:

- who goes first;
- any time limits;
- no surprise witnesses or evidence;
- number of copies of evidence to be submitted;
- role of attorneys; and
- how witnesses are questioned.

5. A party is not required to bring to the hearing every witness on the witness list. You might, therefore, want to request a person to be present to testify even if he or she is on a witness list.

Example 2 is a sample letter to the parties which covers these points. Feel free to use or modify it. While it is in simpler language than the Model Hearing Procedure, it was written by an attorney, and so is probably more obtuse than necessary. You may want to try your hand at simplifying.

Witnesses

What is the role of a witness? The parties will believe that the role of a witness is to advocate their viewpoint at the hearing. Each will claim a proprietary interest in his or her witnesses. A common complaint grievance administrators hear from parties is, "The other side is trying to talk to my witnesses!"

Talking to the other side's witnesses is perfectly permissible. A witness is not an advocate for one side; the role of the witness is to tell the panel the facts as he or she remembers them. The role of the witness is to tell the truth. Someone may be listed as a witness for both sides. The fact that a person has been claimed by one side as a witness is not a prohibition on the other side talking to that person. Indeed, if both sides prepare their cases well, each will want to talk to some of the same key witnesses.

The parties should be cautioned not to instruct people to refuse to talk to the other side. If it is reported to you that this is happening, you should intervene. The party that is encouraging the stonewalling should be scolded, and the witnesses should be contacted and told that they are under an obligation to cooperate with both sides.

In planning logistics, special thought should be given to the comfort and convenience of the witnesses. While the parties are highly motivated to participate actively in the hearing, the witnesses are not. For the witnesses, testifying is at best an inconvenience, and at worst something dreaded. Witnesses know that they are being brought into the middle of a highly contested and emotionally charged dispute. They know that telling the truth will anger at least one if not both sides. They realize that every word they say is important, and are worried about being able to be articulate under pressure. It is simply not an experience they will be looking forward to.

You can help minimize this in a few ways. First, you should make the waiting period as pleasant as possible. It can be quite tedious to wait outside the hearing room. Encourage the parties to plan their cases so that witnesses need only be there for a portion of the hearing. Witnesses might even arrange to be on standby, able to show up fifteen minutes after a phone call. Second, make sure that there is a comfortable waiting space for them. They should have a room with chairs, magazines, and, if possible, coffee, water, or access to some such refreshments. Even a well planned hearing can produce long waiting times

TO: The Parties in Grievance No. _____

FROM: The Grievance Panel

RE: Hearing

The panel has accepted the complaint for hearing. The hearing will be held *[date and time]*, with the possibility of it running through *[date and time]* if more time is needed. All parties must be present at the hearing. The hearing will be held *[place]*.

The hearing will be conducted according to the Model Hearing Procedure. A copy of it is enclosed. We try in this memo to tell you the important parts of that Procedure, but you need to read it yourself and be responsible for following it. If you have any questions, you can contact *[administrator]*, at *[phone number]*.

While the hearing allows you to present evidence and witnesses, it is not a formal court of law and formal court rules will not be followed.

The Model Hearing Procedure requires you to make certain decisions, prepare certain materials, and bring them to us by five days before the hearing. You must bring these materials to *[administrator]*, by *[time]*, *[date]*. In particular you must provide us:

- A list of your possible witnesses (no one else may testify without our consent);
- Any statement of an unavailable witness (see Section 3.5 of the Model Hearing Procedure);
- The name of any advisor appearing with you at the hearing, and whether the advisor is an attorney;
- Whether you want an open hearing (the hearing will be private unless both parties want an open hearing); and
- Copies of all your evidence (no other documents may be submitted without panel consent).

Section 2.2 of the Model Hearing Procedure further explains these requirements.

Please submit five copies of all documents (one for each panel member, one for the panel's advisor, and one for the other party). You may pick up your copy of the other party's documents at *[place]* as of *[time]*, *[date]*.

Your advisor, if you bring one, may give you advice during the hearing, but may not speak for you or conduct the hearing for you, unless you have some special need. If you have a special need, you must let *[administrator]* know by *[time]*, *[date]*.

The complainant will present *[his]/[her]* case first.

A few words about witnesses. Witnesses are just people who know something about the dispute and who are willing to tell the panel what

Example 2

they know. Their obligation is to tell the truth. Witnesses are not supposed to "help" one side or the other, even though you may believe that what a particular witness says will help you. They are there to help the panel learn what happened. You can, and probably should, be a witness for yourself. You do not need to have any other witnesses. Someone may be a witness for both parties. *Do not discourage someone from being a witness for the other side.*

Witnesses will not be allowed to attend the hearing, except for when they are speaking to the panel. If you bring witnesses, please explain to them that they will have to wait outside until it is their turn. We will have a waiting room available for them.

At the hearing, you will have the right to ask questions of all witnesses. The panel may ask questions of you or of any of the witnesses. [*Alternative:* At the hearing, you will be given the opportunity to propose questions for the panel to ask the witnesses.]

Now, on to communications. The grievance procedure provides for communications to you from us by *[U.S. mail] [certified mail] [personal delivery]*. We may need to communicate with you more promptly, especially as the hearing date approaches. Please let us know how we can best get messages or materials to you quickly. One option is for us to call you with messages or when materials are ready to have you pick them up at a pre-arranged site.

Any communications you have with the panel must be through *[the administrator]*. Please do not attempt to contact us directly, because that could threaten the integrity of the hearing process. All written communications to or from us will be shared with the other party.

Optional: In order to help us plan the hearing, please let us know by *[date]* which witnesses you expect to bring to the hearing and how much time you think you will need. You will not be bound by this information, but it will help us plan for an orderly hearing. If your estimates change after that date, we would appreciate an update.

In summary, you need to meet the following timelines:

[date] Let us know how many witnesses you are planning for the hearing, and how much time you think you will need.

[date] Let us know of any special need to have an advisor speak for you.

[date] Submit the information and materials listed on the previous page.

[date] Be present at the hearing, with your witnesses.

We realize that this is a lot of information and rules. Please read this carefully several times and, if there is anything you do not understand, please call or write *[the administrator]*.

Enclosure: Model Hearing Procedure

Example 2

for witnesses. A bored or frustrated witness will be less cooperative and less productive for the panel.

If there is unexpected waiting, because of procedural maneuvers or otherwise, someone should talk to the waiting witnesses, and explain what is happening. Nothing is more frustrating than endless waiting without explanation.

First impressions are important. When the witness finally enters the hearing room, he may feel intimidated. A friendly welcome from the chair can put the witness at ease, as can an explanation of where to sit, who the various people in the room are, and what is going to happen.

SEXUAL HARASSMENT PANEL HEARINGS
Notice to Witnesses

You have been called as a witness in a hearing before a three-member panel of the sexual harassment committee. The panel members are *[list panel members]*. This is not a court of law, but rather a part of our system of due process for resolving disputes. The fact that allegations have been made and are taken seriously does not mean that they are true.

The question being considered by this panel is whether or not there has been sexual harassment of the complainant *[complainant's name]* by the respondent *[respondent's name]*. Sexual harassment is defined below in words taken from the Sexual Harassment Policy. Following the presentation of all testimony, the panel will judge whether there has been sexual harassment and, if so, it may make recommendations for disciplinary action against the respondent and/or action to remedy any unfair professional or academic treatment of the complainant.

The role of a witness is not that of an advocate or helper for one side; a witness' obligation is simply to tell the truth. You have been asked to be a witness because you know something about the dispute. You are here to share that information with us. We very much appreciate your assistance.

Parties and/or their advocates may ask you questions. [*Alternative:* You will be questioned only by the three panel members, though either party involved may submit questions for the panel to ask.] We ask that you give truthful, thoughtful answers. You will be given ample opportunity to tell what you know about the case.

This hearing is "closed." The outcome of this hearing could result in serious consequences for one or more of the parties involved. Only the panel, the complainant, the respondent and their respective advisors/advocates *[identify advisors/advocates]* will be present. You are not to discuss the case with persons not associated with the case until a final decision has been reached by the panel.

Sexual harassment definition:

[Insert from policy]

Example 3

Because this will be a new experience for most witnesses, they may lack a basic understanding of what their role is. This adds to the mystery and fear of the entire situation. It is useful to prepare a simple notice for the witnesses explaining some of the basics of what will happen and what is expected of them. You can give the notice to the witnesses to read while they wait. The contents of the notice will depend upon the particular case, but *Example 3* is one sample that was used in a sexual harassment hearing to good effect. You may want to consider something similar.

LAST MINUTE COMMUNICATIONS

Especially when the parties have attorneys, they often have questions in the days just before the hearing that need to be resolved.

They may have newly discovered evidence they want to introduce. They may want to arrange for an out-of-state witness to present testimony by telephone. There may be a request for a friend or family member to attend to provide emotional support. While all of these details could be left for the opening of the hearing, that would consume precious time. There is value to being able to decide these questions ahead of time.

Panel members should either delegate to the chair the authority to decide certain questions, or make arrangements to stay in close contact during those days so that any last minute decisions can be made jointly.

LOGISTICS

If you do not have a professional administrator who is used to running hearings, it is easy to omit a critical step planning the logistics. At a minimum, remember the following five items:

- Set the hearing date as soon as you can.
- Reserve the room for the hearing. Remember that you need a place for witnesses to wait.
- Arrange for a high quality tape recorder and sufficient tapes. Assign responsibility for running the tape recorder during the hearing. Test it ahead of time.
- Make parking arrangements for the panel, parties, attorneys, and witnesses.
- Arrange for coffee, water, and napkins.

Chapter III

Conduct of the Hearing

PANEL CONTROL

Remember that you—the panel—are in control of the hearing. This is especially important since you are the neutral group in the room, representing the institution. The other parties in the room all have vested interests.

If a party or a party's advisor gets into a dispute with you over a point, you should, after providing a reasonable opportunity for presenting arguments, simply make a decision and end the debate. The party can always raise the argument again on appeal. It is important to get on with the hearing. Besides, if you roughly stay within the guidelines in this guide, and act reasonably, any appeal is unlikely to be successful. You are more likely to create a due process violation by indecision or by allowing arguments to go on endlessly, than by closing debate and moving on.

Remember, too, that you control decorum in the hearing room. Anyone who refuses to follow your decisions may be silenced, or, in the worst case scenario, barred from the room. This applies even to parties or their attorneys (although then you may instead choose to take a recess). You may want to allow the person back in the room after a short time.

OPENING REMARKS

The panel chair should have the first word, and should have a checklist of points to make at the beginning of the hearing. A sample checklist is provided for your consideration at the end of this chapter. (Since it summarizes many of the points made in this chapter, it would be premature to provide it now.)

EVIDENCE RULES

In general, there are no evidence rules for college and university hearings. In litigation, the rules of evidence serve to exclude information that is inflammatory, irrelevant, or misleading. Some leading thinkers, however, believe that many of the rules of evidence are outmoded, and simply generate more litigation. Rather than devoting energy to deciding which evidence may be considered, these commentators believe that most evidence should be admitted, and that the person opposing the piece of evidence can explain why he thinks it is misleading, irrelevant, or inflammatory. The decisionmaker can then decide how much weight to give that piece of evidence.

This is the approach we take in informal hearings. If someone complains that a piece of evidence is, say, hearsay, the panel should simply say to this person, "Please explain why you think we should not give this evidence much credence. We will hear the evidence and take your arguments into consideration."

Only in extreme cases should you exclude evidence. This would include extreme examples of repetitiveness (for example, multiple character witnesses), or invasion of privacy. For example, in one sexual harassment case, the respondent wanted to introduce evidence of past sexual abuse of one of the complainants to suggest that she would not be able to distinguish between sexual harassment and appropriate behavior. The panel excluded the evidence because (1) there were other complainants and witnesses to the respondent's behavior and (2) the panel was using the "reasonable woman" standard applied to the facts, rather than simply taking the complainant's evaluation at face value.

Hearsay

Hearsay is one of the most commonly used and least understood concepts in the evidence rules. Although you will generally not worry about whether something is hearsay, it might be useful to explain it.

Generally, hearsay is a statement made prior to the hearing, that is quoted at the hearing in order to convince you that the statement was true.

In informal hearings, you generally admit hearsay, both because it may be relevant and because it avoids the need for multiple witnesses. Nevertheless, a hearsay statement must be interpreted skeptically; it lacks the reliability of in-hearing testimony in the following ways:

- The statement was not made in a formal setting under pressure to speak carefully and truthfully.
- The opposing side was not present when the statement was made. This removes some of the pressure to speak accurately

and eliminates the opportunity for the opponent to challenge the statement meaningfully.

- You were not there when the statement was made. Without viewing the speaker's demeanor it is more difficult to evaluate the speaker's credibility.
- The context of the statement may be unclear. The speaker may have been rushed, pressured, intoxicated, irritated, or joking.

This is not to say that hearsay should be ignored. But it must be interpreted with a skeptical eye. It may support your decision but rarely should be the primary basis for it.

THE TAPE RECORDER

It is easy to tape a hearing. It is not so easy to produce a tape that serves as a meaningful record for listeners. In order to create a good record, it is important to keep in mind the purposes for making the record. There are two categories of people for whom you are making the tape recording.

The first, and to you most important, is the panel. On complicated cases you cannot remember all the evidence perfectly. You will want to turn to the tape recording to review critical testimony. In a six- or seven-hour hearing which generates many tapes, it will be difficult to locate the particular testimony you are seeking. It is critical, therefore, both to mark each tape *before you begin recording on it*, and to create a written log of the tape recording. That is, one person should note, in the log, the time of each witness' testimony, cross-examination, panel questioning, etc., and in a separate column note which tape and which side of the tape is being used for that particular section of testimony. That way, when you review later, you can identify the witness, use your memory as to when in that person's testimony the section you are interested in occurred, and then, more easily find it on the tape.

The second category of people reviewing the tape will be those people hearing the case after you render your decision. Perhaps the tape may need to be transcribed. Both the appellate reviewer and the transcriber will have even more difficulty than you in identifying things on the tape. Voices will be unfamiliar. It is critical, therefore, to identify every voice on the tape recording. You should do this at the beginning of the hearing, by having everyone in the room identify themselves for the tape recorder when it is turned on. You should also make a comment to the tape recorder every time someone new enters the room. Each witness, of course, will first state his or her name for the record.

Another common problem with taped records is that much communication is nonverbal. People point, shrug their shoulders, shake

their heads, and estimate sizes with their hands. None of this translates to a tape recording. Explain this to witnesses, and be alert to such non-verbal communication. When it happens, ask the witness to translate it into words. If the witness can't, provide some help. Say, for example, "When you shrug your shoulders, are you saying that you don't know?" or "Are you pointing to the woman in the red hat?"

When you start each tape, you should identify it. For example, you should say something like, "This is the hearing of *[Complainant's]* complaint of discrimination. It is now 9:30 p.m. on August 23, 1997."

Finally, critical testimony can be lost while the tape is being changed. Someone needs to monitor the tape recorder closely, and ask everyone to stop talking while the tape is being changed.

OPENING STATEMENTS

In litigation, attorneys use opening statements to give the judge or jury a brief synopsis of what the case is about, and what will be presented. It places what is to come in context. In informal administrative hearings, untrained parties often find it difficult to do this. Often, a party will attempt to give a brief synopsis, but is so involved in the case that the synopsis quickly evolves into the presentation of the full case, or results in an extremely long-winded set of arguments.

On the other hand, because the parties are often nervous, an opportunity for opening statements can serve as a valuable "warm up."

For these reasons, while it is useful to allow opening statements, it is important to be strict about the time limits allowed. Give the parties a one-minute warning as they approach the end of their time limits, and then be firm in moving on.

CLOSING STATEMENTS

In litigation, attorneys use closing statements to weave all of the evidence that has been presented into a logical explanation of their side of the case. Evidence is rarely presented in logical sequence. The sequence is instead governed by practical factors such as when a particular witness is available to testify. The decisionmaker may be wondering why certain testimony was presented and whether it is relevant. If the closing argument fails to clarify, you can generally ignore the evidence. A successful closing argument, on the other hand, can tie the evidence together into a logical framework. It may require an hour or more.

Parties who are not attorneys, being untrained in presenting cases, rarely take full advantage of this opportunity. Instead, they use closing arguments to restate the general themes of their position, or rehash a particular argument. Although useful, it does not warrant more than ten or fifteen minutes. Firm time limits should be established

for closing arguments. The panel will need to assess the likely value of closing arguments when setting the time, taking into account the complexity of the case, the amount of evidence, and the abilities of the parties and their representatives.

Remember, too, that the closing argument is not the place to present new evidence; if someone tries to do that, you should stop it.

Closing arguments may be written as well as oral. Under the Model Hearing Procedure, after the evidence is presented, you can decide whether or not to accept written closing arguments. (Section 3.7.). In considering whether to do so, think about the following factors. How complicated was the case—do you really need written arguments to make sense of it? Does the time schedule at the hearing make adequate oral closing arguments unlikely? Giving the parties time to compose written arguments will delay deliberations by a week or more—can you afford the time? Do the parties (or their advisors) have comparable writing skills so that written closing arguments will not give an undue advantage to one side or the other? Or, alternatively, do the parties have such different oral abilities that written closing arguments will help even the gap?

MANAGING WITNESSES

Invoking the Rule

When I was a new and very "green" attorney representing a party before a grievance panel, the opposing attorney asked me if I planned to "invoke the rule." I think he intended to intimidate me in case I didn't know what "the rule" was. Too naive to understand that I should have known what he was talking about, I simply asked him, "What rule?" He explained that he was talking about having witnesses wait outside the hearing room, so that they would not hear each other's testimony. I agreed that this was an excellent idea. It is.

So, you should follow this practice, and never be intimidated when an attorney asks whether you plan to "invoke the rule."

Explaining to Witnesses

Of all the players in a hearing, witnesses are your most important and your most vulnerable. It is critical to explain to them everything that is happening. As noted in Chapter 2, you should prepare a handout for them. When a witness enters the hearing room, attempt to put him or her at ease. Explain what is happening and who everyone in the room is. Ask whether the witness has any questions. Explain that every response should be heard on the tape recorder—non-verbal responses should be avoided. If the witness has been waiting for some time, acknowledge this, and thank the witness for being patient.

Questioning by the Parties

In litigation, the general format for witness testimony is for the attorney to ask questions and for the witness to answer them. On cross-examination, the questions may even be leading questions.[1] In informal hearings, this question-and-answer format is permitted, but not required. You should be flexible. You may certainly allow the witnesses simply to tell their stories, without questions.

A loose conversation between the party and his witness is another option, but it is trickier. Remember that the witness' task is to tell the panel facts to the best of his or her recollection. These facts may not precisely coincide with the party's version of events. It is critical that the information you get during a witness' testimony comes from the witness and not from the party.

Cross-examination can be trickier still. In formal litigation, there are rules to keep the process from getting out of hand. There are no such restrictions in informal hearings. You must use your common sense to keep things under control. Witnesses should be protected from abusive questioning. This does not mean that they cannot be asked hard questions — questions that force them to admit unpleasant truths. It does mean that the tone should be civil.

Especially problematic are cases in which emotions are running high on both sides, and in which no attorneys or advisors are present. Allowing one party to cross-examine the other can lead to an argument, a shouting match, or worse. It is on cross-examination that you should be strictest about requiring a question-and-answer format, and prohibiting interruptions. Do not allow the questioner to respond substantively to the witness' answers. For example, after the witness makes a statement, do not allow the questioner to jump in shouting, "That's not true—it wasn't that way at all!"

Remind the questioner that each person has a chance to present his or her point of view. The questioner has a time to testify; now it is the witness' turn. Similarly, restrict the witness to answers. Do not allow the witness to turn on the questioner and ask questions. If the witness is a party, point out that he or she can ask questions of any witnesses, including the other party, at the appropriate time. If the witness is not a party, simply point out that the witness' role is to simply tell the truth, and not to ask questions or be an advocate.

If all else fails, you can require the parties to do cross-examination by submitting proposed questions for the panel, and having the panel ask the questions. Make sure to give the person doing the cross-examination enough time to write the questions out.

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1. Leading questions are questions which suggest their answer. For example, "Isn't it true that you murdered the victim?"

Questioning by the Panel

You will invariably have questions for the witnesses. These questions can be your most important tool in learning the information you need in order to make a decision about a case.

When should you ask questions? It is difficult for most witnesses to tell their stories and remember all the key points; you are usually better off not interrupting, and saving your questions until the end. If you are having difficulty understanding the testimony, however, then you should interrupt with a question, so as to make the testimony meaningful. For example, if the witness is describing a conversation and you are unclear as to who was talking, or when it took place, or where, you may need to interrupt to get clarification. But when you are troubled by inconsistencies in the witness' version of events, you are better off holding questions about those inconsistencies to the end, so as not to fluster the witness. Also, if you suspect that the witness is lying, you are better off letting the witness embellish the story for as long as possible; this will make it easier to determine whether the witness is lying.

This brings us to one of the key purposes of witness testimony. The reason you are having a hearing is in large part to resolve a factual dispute between the parties. Often, this boils down to determining which of two contradictory witnesses you believe. You will need to determine which witness is not telling the truth, through oversight, forgetfulness, lying, or some other reason.

You can use your questions to help do this. Ask many questions about the details of key disputed events. Often, a witness who is lying will get trapped in the development of the details. You may not even realize this at the time, but in reviewing the testimony during deliberations, you will notice inconsistencies or impossibilities if you have asked enough questions about the surrounding circumstances.

Do not hesitate to confront a witness with your doubts about his or her testimony. For example, if a witness is describing an employee's outrageous behavior, and you find the description outlandish, you should tell the witness that you find it difficult to believe that any employee would behave so outlandishly and ask for a further explanation. Or, if a cashier testifies that money mysteriously disappeared from the cash drawer on a regular basis, you can say that you find this difficult to believe, and ask the witness if there is any explanation. Not only will this help you develop the testimony, but it is a matter of fairness to the witness to have an opportunity to know where the testimony is weak and provide further explanation.

You can also confront the witness with opposing evidence. For example, if a person testifies that the boss gave authorization to take the day off, you may point out that both the boss and other eyewit-

nesses disagree with this recollection. You can then ask for an explanation. In this way, you have given the witness every opportunity to explain his or her version of the facts.

Finally, it is important for the chair of the panel to moderate the panel questions. Let each panelist ask questions in turn, giving the panelists as many turns as they want, if necessary. Most importantly, do not allow panel members (or anyone else) to interrupt a witness' answers to ask a new question. There is little more frustrating than realizing in hindsight that the witness was cut off before revealing critical information.

SURPRISE WITNESSES OR EVIDENCE

As you will recall, the Model Hearing Procedure requires the parties to submit to the panel and each other copies of all their evidence and a list of their witnesses five days before the hearing. What do you do if a party brings forward a surprise witness or presents some evidence that was not on the list? This is covered in the Model Hearing Procedure Section 2.2. It is discussed in somewhat more detail in Chapter II, under *Notices by the Parties.*

ABSENT PARTIES

What should you do if you give a hearing and no one comes? Or, what should you do if you give a hearing and only one side comes?[2]

The Model Hearing Procedure addresses this in Section 3.2. Both parties are required to be at the hearing. If one of them doesn't show up, the panel has a choice. It can simply rule against that person, or it can go ahead with the hearing and listen to whatever evidence the other side presents, and then make its decision.

In deciding which of the two options to take, consider the following: Based upon the submitted witness list and evidence, how strong do the respective parties' cases seem? How much is at stake? How strong are the due process rights of the missing person? In making this decision, you would be wise to consult with your attorney.

Of course, in either case, the person who didn't show up should have some opportunity to explain why. Obviously, if the party was unavoidably detained, such as because of a car accident, this should not end the case. The party should then be given another opportunity for the hearing.

HOW TO THINK

What seems obvious and simple in other contexts may be inappropriate in the context of a hearing. Usually, as you hear informa-

2. A related question is: What should you do if one side does not submit any witness list or evidence five days before the hearing, thus effectively preventing that side from making its case? This is treated the same way as the other situations discussed.

tion, you absorb it and develop your opinions as you go along. You should not do this at a hearing. You should be no closer to a decision toward the end of a hearing than you were at the beginning! After all, if you have largely made up your mind seven-eighths of the way through the hearing, then you are not giving the last one-eighth of the hearing testimony a fair listen. Nor are you giving your fullest consideration to closing arguments. Finally, you will be minimizing the usefulness of the deliberations and your co-panelists' comments.

There is a concept in Zen Buddhism called "open mind." You should maintain the openness of a child during every moment of the testimony, up to and including the very end. Rather than trying to reach a conclusion, you should be trying to absorb all of the evidence and the testimony, and thinking of different arguments and counter-arguments that can be made with it. The actual decisionmaking should be postponed until deliberations.

Deliberations will be discussed next. First, however, I promised you a checklist of what to say at the beginning of the hearing. Now that we have discussed how the hearing should be conducted, you are ready for the checklist. Here it is:

Opening Remarks Checklist

- ❒ Turn on the tape recorder and tell everyone it is on.
- ❒ Announce that this is the hearing for Grievance Number ___.
- ❒ Explain that all communications should be verbal; gestures, nods, shrugs, etc., cannot be recorded by tape. Remind people that the hearing will need to be interrupted periodically while you change tapes.
- ❒ Tell the parties that copies of the tape (but not a transcript) will be available to either party.
- ❒ Ask everyone in the room to state their name, their position at the institution, if any, and their role in the hearing.
- ❒ Remind everyone that the panel is a neutral fact finder and is not siding with either side in this dispute. Tell them the panel will base its decision only on the evidence presented to it.
- ❒ Explain the schedule for the hearing, and summarize who may ask or submit questions and when.
- ❒ State that legal rules of evidence will not be followed. Explain that you will err on the side of receiving evidence but will listen to arguments as to why objectionable evidence should not be taken into consideration.
- ❒ State that non-party witnesses will not be present except while testifying.
- ❒ Explain the role of advocates and attorneys.

- ❒ State that the hearing is being conducted pursuant to the Model Hearing Procedure, and *[any other applicable procedure].*
- ❒ State that the purpose of this hearing is to determine whether a violation of institutional policy occurred, and, if so, what should be done about it. Name the policy and section you believe applies. Announce that if either party believes any other policy is involved, it should be called to your attention.

Chapter IV

Deliberations

WHAT NOT TO TALK ABOUT

Okay. You are now sitting in the deliberation room. You've managed to keep an open mind throughout the entire process. Now it's time to decide, right? The most efficient way to proceed would be to go around the room and get each panelist's tentative decision, right? That way, if everyone is in agreement, you don't need to waste time debating. If there is a difference of opinion, you can then proceed to discuss it. *Wrong.* This would be the worst thing you could do.

It is mandatory that you deliberate. Deliberation means discussion by all the panelists on all the key issues. There is good reason for this. After extensive testimony, people cannot bring to the forefronts of their minds all the evidence and testimony simultaneously, with all its inconsistencies and contradictions. Different aspects of the evidence will be clearer to different panelists. Only through discussion can the different parts of the evidence be considered together, and compared, and discrepancies discussed. Indeed, I have seen cases in which several panel members were leaning toward the same conclusion for different reasons. After they compared notes, they recognized inconsistencies and changed their conclusions. Thus, even panelists who agree with you can help change your mind to reach a better decision.

What, then, should you talk about?

First, a warning. In some cases, a panelist may have been familiar with the case, or with one of the parties or witnesses, before the hearing. As discussed earlier, this does not require recusal. It does, however, require that that panelist attempt not to take into account any such information. Only the evidence presented at the hearing may be used in the decisionmaking. It is especially critical, therefore, that any

outside information not be mentioned to the other panelists. If it were, then both parties would have a right to know about this and to comment on it to the panelists, as part of their due process right to notice and an opportunity to be heard. (Presumably any relationship between the panelists and the parties and witnesses has been brought out at the beginning of the hearing, with both sides having an opportunity to object.)

WHAT TO TALK ABOUT

Start with the facts. The panel should identify the key factual issues, then take each issue in turn, and discuss the evidence on that issue. Even if it seems a simple issue to resolve, you should verbally identify the evidence supporting your conclusion. Conceivably, on articulating the evidence, you may realize that there are holes in it. Or, you may feel more certain than ever. You should attempt to articulate why contrary evidence is not persuasive. Remember that you are not yet deciding the ultimate issues, but only the factual issues.

This is a difficult distinction. Perhaps some examples will help. In one sexual harassment case, a male employee made sexual comments to a female employee. There were disputes as to precisely what he said, and whether there were other people present in the room. First, the panel considered the evidence and reached conclusions as to approximately what was said, and whether other people were present. This resolved the factual issues. Then, based upon those decisions, the panel decided whether the statements constituted sexual harassment. In another case, a faculty member made remarks about members of a certain ethnic community in a class. There was a dispute as to what she said. Disciplinary action was taken against her. She grieved the disciplinary action. The decisionmaker first had to resolve the factual issue of what was said. Based on that conclusion, he could resolve the ultimate issue of whether the faculty member had committed wrongdoing.

Generally, you should first decide the factual issues, and then proceed to the ultimate issues. In complex cases, however, where you have several ultimate issues, and where you have separate factual patterns relating to each, it may be more efficient to discuss one cluster of factual issues and resolve them, and then resolve the related ultimate issue, before going on to tackle the next cluster of factual issues and ultimate issue.

Only after the ultimate issues have been resolved can you proceed to the next decision point—what action should be taken. In some grievance procedures this will be a mere recommendation; in others, the panel will have actual decisionmaking power. In any event, the recommendation must be based on how you decided the ultimate is-

sues, just as the ultimate issues were resolved based upon how you decided the facts.

WHO DECIDES?

Generally, you should try to reach decisions by consensus. If you can hash out all the arguments and counterarguments, you will have a far better decision in the end. If this becomes impossible, decision by majority vote is permissible. A panel member who disagrees with the final decision can write a dissenting opinion.

Different grievance procedures give the chair different roles. In some procedures, the other two panel members first try to decide the issue. Only if they cannot reach a decision does the chair vote. In most grievance procedures, however, the chair is a full voting member of the panel. Additionally, the chair is responsible for organizing the deliberations, breaking up and structuring the issues and deciding when to vote. Often, too, the chair writes the first draft of the decision.

HOW TO EVALUATE CONFLICTING TESTIMONY

One of the greatest difficulties in deciding a case is resolving factual issues where there is evidence on both sides. Many times, when two witnesses give directly conflicting accounts of a key factual situation, panelists will want to throw up their hands and give up. ("It's one person's word against another's.")

It is always possible to resolve a dispute. First, you need not (and should not) give all testimony equal value. In your job as panelist, your human experience and background is called upon. Especially in evaluating live testimony, don't be afraid to use your common sense and personal experience. Remember that people fail to tell the whole truth for various reasons: bias, forgetfulness, poor choice of words, accidentally leaving things out, dishonesty, and poor communication skills. You should take into account such non-verbal cues as eye contact, body language, demeanor, and tone of voice. Pay special attention to sudden changes in a witness' demeanor or style as difficult subjects are broached.

In other words, you can use your "gut reaction" to help decide whether someone is telling the truth or not. Two words of caution in this regard, however. First, distinguish between your personal like or dislike of a witness and your estimation of the witness' honesty. You may immediately dislike a witness while believing that witness' testimony. Similarly, you may immediately feel some empathy toward a witness, yet nevertheless decide that she is not telling the truth.

Second, watch out for ethnic and cultural differences, and, to a lesser extent, gender differences. Remember that different cultural

groups communicate differently. Some are more or less comfortable than you about talking about personal or sexual matters in front of people. Different groups have different norms for voice loudness, eye contact, etc. Especially when dealing with witnesses from cultures with which you are not familiar, be observant. In these cases, the changes in demeanor as different topics are approached may be more telling than overall demeanor.

Other factors too, can help you discern the accuracy of testimony. Inconsistency on details is often telling. While most of us have difficulty remembering details, especially on minor points of incidents which happened a long time ago, some events are so significant to a witness that accuracy on key details should be expected. Inconsistencies as to identity of people present, or order of events, or location, may be giveaways. As you will recall, I advised you to question witnesses in detail on these key events. All three panelists should now, during deliberations, discuss the testimony to see if it was basically consistent. You may want to listen to the hearing tapes of such key testimony.

Another factor, if several witnesses testified about an event, is which witnesses support which story. It is easier to believe that one person is lying or inaccurate than it is to believe that three or four are. On the other hand, if the three or four witnesses with the same story have a close relationship, the consistency of their testimony is less significant.

It could be the result of collusion between them. Or, more innocently, they may have been discussing the matter in the time between the event(s) and the hearing. (As people talk about something, their perspectives and recollections converge. This is the reason witnesses are not allowed to observe each other's testimony.)

Admissions which put the witness in a bad light are more likely to be true than statements which put the witness in a good light, as common sense will tell you. A supervisor stating, "I admit that I use coarser language than I should, but I hardly ever use ethnic slurs," is more believable than a supervisor who denies ever having used rough language.

Nevertheless, sometimes, none of these tips will work. Sometimes, you just have a situation in which there are only two witnesses, both believable, who contradict each other. Or, worse, on a key point, neither side has introduced any evidence whatsoever. In these cases, can the panel do anything but throw up its hands and give up?

YOU CAN ALWAYS FORM AN OPINION

Two very helpful but confusing concepts are "burden of proof" and "burden of persuasion." You use these when the evidence does not resolve the issue for you.

The party with the "burden of proof" is the one who must introduce some evidence on an issue or lose it. The burden of proof is almost always on the complaining party. Thus, if the complainant is claiming that he was discriminated against, he must introduce evidence that he was harmed, and that the harm came about for discriminatory reasons. The evidence may be as simple as his own testimony, but it must be there. If the complainant does not at least address the key issues, he loses them, even if the respondent presents no evidence. You should consult your attorney as to who bears the burden of proof as to the various issues in your case.

The burden of persuasion is more subtle and difficult. If both sides have presented you with proof on an issue, the burden of persuasion tells you what standard to use to weigh them. In many cases, the complainant has the burden of persuasion "by a preponderance of the evidence." This means, that in order to find in the complainant's favor, you must find that the evidence favors the complainant's position, however slightly. That is, the evidence must make it slightly more likely that the complainant is correct than that the respondent is correct. If you find the evidence exactly equal on both sides, you must rule for the respondent.

In other cases the burden of persuasion will be upon the respondent. In yet other cases, or in other issues within the same case, there may be a burden of persuasion of "clear and convincing evidence" on one party. This means that the party with that burden must convince you to a degree of moderate confidence and certainty that that party is right. If you are left thinking that that party is only very slightly more likely to be correct than the other side, then you must rule for the other side on that issue. Again, you should consult your attorney as to what burden of persuasion applies to the issues in your case, and who bears it.

The point is that you never throw up your hands and say that you can't decide because you aren't certain, or because the evidence is too close to call, or because there wasn't any evidence presented. With the help of an attorney, and using the concepts of burden of persuasion and burden of proof, you can always reach a decision on any matter presented to you.

DOCUMENT YOUR MEETINGS

You should document how long you spent in deliberations, and what days and hours you met. If your decision is challenged on appeal or in court, you may face a claim that you did not give adequate consideration to the case. I have seen many court decisions in which this issue is resolved by the court reciting how many times the Panel met and for how many hours before reaching a decision. Having that

information in the record will be of value to you. (Of course, if you reach your decision in 10 minutes, it might be better to not keep track of it. But then, you probably were not following the instructions in this chapter.)

Chapter V

The Written Decision

DESCRIBE THE PROCESS

In order to show what a careful job you did, you should first describe the process you used. The first paragraph of your decision should recite when the hearing was and how long it lasted. It should then describe when the deliberations took place and how long they lasted. If there is a dissenting opinion, that should be noted in the opening. Otherwise, it should state that the decision is agreed to by all panelists.

FINDINGS OF FACT

Your findings of fact, if well reasoned and well written, will be very difficult to reverse on appeal. You were present at the hearing, listening to all of the witnesses, observing their demeanor, and reconciling their testimony. Appellate reviewers of your decision, both within the institution and later in court, will have a tendency to defer to your decisions on the facts. It is therefore important to write this part of the decision very carefully.

Your findings of fact should tell the story of what happened. Each main point should be addressed. Where there is strong conflicting evidence, you should not only state your finding, but also address the opposing evidence, and explain briefly why you did not accept it. There is a natural reluctance to give your reasons. It makes you feel vulnerable. Someone reviewing the decision could disagree with your reasons and reverse you. Actually, you are less likely to be reversed if you give your reasons. Appellate reviewers will tend to give your factual findings some deference. If either party can show that you ignored critical evidence, however, the appellate decisionmaker may have no choice but to reconsider. By discussing the main opposing evidence and explaining why it didn't persuade you, you eliminate such oversight arguments.

A common mistake made by beginning panels is to try to give credence to both sides. On any given factual issue, they will merely recite each side's evidence. For example: "*Student A* claimed that *Student B* threw a brick at him after aiming and intending to hit him. *Student B* claimed that he was attempting to juggle some bricks and accidently dropped one near *Student A.*"

That is not a finding of fact; that is a mere summary of the evidence. The panel must decide whether it believes *Student A, Student B,* or a third alternative. Without such a finding, the ultimate decision has no factual basis, and must be reversed.

CONCLUSIONS

Unfortunately for you, conclusions are more likely to be reversed on appeal than findings of fact. An appellate body can reach a different conclusion simply because it reasons differently. The more clearly you lay out the reasons for your conclusions, the more persuasive you will be to the appellate body. Therefore, you should explain how the findings of fact support the conclusions you reached, and lay out your reasoning. The main counterarguments that you considered should be included, as well as the reasons you rejected them. Also include any institutional procedures or norms, and any law that you relied upon.

RECOMMENDATIONS

Finally, you should include your recommendations for what should now be done. This is the part of your opinion that is most likely to be reversed on appeal within the institution. A higher-level official or body may agree with all of your facts and find no flaw in your reasoning, but simply decide that you were too harsh or too lenient in your recommendations. No reason need be given except a general sense of what is appropriate. Indeed, if the panelists don't have a lot of experience in handling the type of situation in front of them, they may well make a recommendation that is out of line with institutional norms. Nevertheless, the panel should do its best to make a reasonable recommendation based upon the facts before it, and provide a justification.

If the next decisionmaker is a court, rather than an internal appeals body, then the panel's recommendation is likely to get much more deference. The panel will be in a better position than the court to decide what institutional norms are. If a court accepts the panel's facts, findings and reasoning, it will likely also defer to the panel's recommendation.

APPEAL PROCESS DEADLINES

While each party is responsible for knowing the governing rules and procedures and knowing appeals processes and timelines, you don't want someone to miss the deadline through inadvertence or ig-

norance. For this reason, you should always include, at the end of your report, a statement of how either party can appeal your decision, under what deadlines, and to whom. This will make your process fair and professional.

Chapter VI

Conclusion

Congratulations—you now know everything you need to know to run a hearing. Do not let the detail in this guide overwhelm you. Remember, 90% of the success of a hearing is the panel's common sense, reasonableness, and willingness to be decisive. No one expects you to be a professional judge. You were selected for the panel because of your perspective within the institutional community. Don't be afraid to use it and rely on it.

While you may want to have an attorney advise you ahead of time, and you may want to have an attorney on standby during the hearing itself (especially if there are lawyers for the parties at the hearing), if you remember just the basic principles in this guide, and have the guide and the relevant procedures there to look up the more esoteric points at the hearing itself, you will do just fine!

Appendix

Model Hearing Procedure

Article 1. INTRODUCTION

1.1 **General.** This document provides a standard operating procedure for formal hearings to resolve conflicts at institutions of higher education. This Procedure may be incorporated in another procedure by reference, either as is or with appropriate modifications as set forth in the other procedure.

This Procedure may also be used on an ad hoc basis to handle individual situations where the decisionmaker determines that a formal hearing is an appropriate means to resolve the issue in question. The decisionmaker will then inform the parties in writing that this Procedure will be followed, and will specify any variations from this Procedure.

Normally, a hearing will be held only after the parties and appropriate institutional officials have attempted to resolve the dispute informally.

1.2 **Definitions.** For purposes of this Procedure, the person initiating the grievance or challenging an earlier decision is the "complainant"; the person responding to the grievance or seeking to uphold the earlier decision is the "respondent." This Procedure assumes that a hearing panel has been appointed by the appropriate authority and that an administrator has been designated to serve the panel.

Article 2. PREHEARING MATTERS

2.1 **Preparation of Evidence.**

2.1.1 If any material facts are believed to be in dispute, the parties shall prepare evidence for the hearing which may be in the form of documents, testimony of witnesses, or other materials.

2.1.2 All members of the institutional community shall cooperate with the parties' reasonable requests to provide evidence and to appear at the hearing as witnesses. If a party is having difficulty getting cooperation from a potential witness or source of evidence, he or she shall file a request for assistance with the administrator, who shall forward it to the panel. If the panel determines that the request is reasonable, it shall assist the party in gaining the necessary cooperation within the community.

2.2 **Notice Requirements.** At least five (5) working days before the hearing, each party shall provide the administrator with five copies (one for the administrator, one for the other party, and three for the panel) of the following information, who shall distribute copies to the other party and to the panel:

2.2.1 A list of intended witnesses, or a statement that no witnesses will be called. The panel may place reasonable limitations on the number of witnesses, either before or after the list is submitted, but in no event more than three (3) working days prior to the hearing. No witnesses other than those on the list may testify without the consent of the panel.

2.2.2 Any witness statement submitted pursuant to Section 3.5.

2.2.3 The name of any advisor appearing with the party at the hearing and whether the advisor is an attorney. A party may not bring an advisor without such notification, unless one of the following exceptions applies.

2.2.3.1 A party may bring any advisor if the other party and the administrator or panel consent.

2.2.3.2 If the other party designates a non-attorney advisor, the first party may bring a non-attorney advisor without prior notification.

2.2.3.3 If the other party designates an attorney advisor, the first party may bring an attorney advisor without prior notification.

2.2.4 Whether the party requests that his advisor be allowed to present the case, in whole or in part, and why.

2.2.5 Whether the party requests a public hearing. The hearing shall be private unless both parties agree to a public hearing.

2.2.6 Copies of documents the party plans to introduce into evidence. No other documents may be introduced into evidence without notification unless the other party or the panel con-

sents. Approval of the panel shall depend on the importance of the document, whether the party could have obtained it earlier, the time remaining until the hearing, and the degree of prejudice to the other party.

2.3 **Order of Arguments and Evidence.** The panel may, at least three (3) days before the hearing, specify the order in which the parties present their arguments and any evidence. If the panel does not specify within this time frame, the order specified in Section 3.4 shall be used.

2.4 **Pre-Hearing Conference.** After receipt of the information specified in Section 2.2, the administrator and/or the chair of the hearing panel may meet with the parties and/or their advisors to consider clarifying or simplifying the issues to be heard by the panel, answering any procedural questions, limiting the number of witnesses, or considering any other matters which may aid the conduct of the hearing.

Article 3. HEARINGS

3.1 **Evidence.** If any material facts are in dispute, the parties may testify and may present testimony of other witnesses and introduce and explain documents and other evidence at the hearing. The panel may exclude unfair and irrelevant evidence, but is not required to follow judicial rules of evidence.

The panel may require the production of further evidence beyond that presented by the parties (including the testimony of other witnesses) if it believes such evidence is available and material to the issues in dispute. Either the parties or the administrator may be asked to obtain such evidence. The hearing shall be resumed when such evidence is produced.

3.2 **Absent Parties.** All panel members and both parties shall be present at hearings. Failure by either party to appear at the hearing may be grounds for summary finding against the absent party. Alternatively, the panel may choose to proceed with the hearing without the absent party, and make its decision based upon the evidence available. Failure to comply with the notification provisions of Section 2.2 may be construed as failure to appear, for the purposes of this section. Upon request of the absent party, a finding made under this section may be set aside and a new hearing scheduled if the absentee shows he or she could neither attend the hearing nor request a postponement of the hearing in a timely manner.

3.3 **Advisors.** Each party may have one advisor at the hearing, who may be an attorney. Parties may consult freely with their advisors throughout the hearing, but advisors may not speak for the parties

unless the panel determines that one or both parties are unable fairly to present their case except through their advisor.

3.4 **Order of Evidence.** The panel may, pursuant to Section 2.3, determine the order in which the parties present their arguments and any evidence. If the panel does not specify, the following order shall be used:

(1) complainant presents his or her case;

(2) respondent presents his or her case;

(3) in the discretion of the panel, rebuttal by complainant and respondent may be allowed;

(4) complainant makes closing arguments;

(5) respondent makes closing arguments.

With permission of the panel, evidence may be introduced out of order and additional evidence may be introduced.

3.5 **Witnesses.** The parties may present the testimony of witnesses in support of their case.

When a witness is unable to attend a scheduled hearing, the witness may make an affidavit which may be introduced at the hearing. The affidavit shall be disclosed to the other party pursuant to Section 2.2.2 in order to permit the other party to contact the witness and to prepare for appropriate rebuttal at the hearing. The panel shall exclude the affidavit if the other party has been unable to secure the cooperation of the witness in spite of diligent attempts to do so.

The parties and panel members shall have the right, within reasonable limits set by the panel, to question the parties and all witnesses who testify orally. Reasonable limits may include requiring that questions be directed through the panel.

3.6 **Record of Hearing.** The administrator shall make a tape recording of the proceedings. The parties and their representatives may listen to the tape. At a party's request, the administrator shall provide the party with a duplicate of the tape at the party's cost.

The record of the hearing shall consist of the tape recording and all physical items or documents introduced as evidence. The record shall be kept by the administrator for five years after all appeals have been concluded or after the time for appeal has expired.

3.7 **Written Arguments.** After hearing the evidence, the panel may request or accept written arguments from the parties and defer consideration of the case for up to two weeks until such written arguments have been submitted. Each party shall submit five copies of such written arguments to the administrator, who shall dis-

tribute them to the other party and the panel. Time limits for the panel's decision shall be extended accordingly.

Article 4. GENERAL PROVISIONS

4.1 **Time Limits.** For good cause, the panel shall extend any time limit set forth in these rules. Good cause shall include the fact that a time limit includes finals week or periods such as vacations, holidays, or intercessions if parties or decisionmakers are absent from the institution. Any time extension shall be communicated in writing to all interested parties along with a new written schedule.

4.2 **Absent Party.** If one party is absent from the institution, the decisionmaker, with both parties' permission, may permit the absent party to participate in a hearing or interview by conference call or otherwise.

4.3 **Mailing.** All documents sent by the Administrator to the parties shall be sent by certified mail or personal delivery.